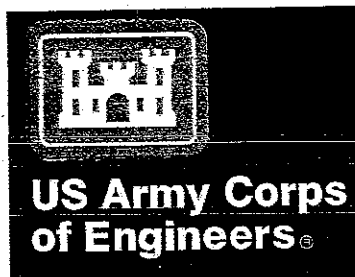


NORTHWESTERN DIVISION  
NATIVE AMERICAN DESK GUIDE



**DRAFT**

## **NORTHWESTERN DIVISION**

# **NATIVE AMERICAN PROGRAM DESK GUIDE**

**For Program Managers, Project Managers,  
Supervisors, and Field Staff**

**Vision:**

A climate of cooperation between the Corps of Engineers and Native American Governments that results in a true partnership providing mutual benefits.

**Corps Native American Program Mission:**

The Corps Native American Program will be a successful component in the accomplishment of the Corps overall mission by initiating, facilitating, and enhancing understanding, communication and cooperation between the Corps and all Native American governments. This will result in efficient and timely fulfillment of Corps trust obligations and responsibilities while actively contributing to the Corps decision-making and program implementation activities.

## FORWARD

The U.S. Army Corps of Engineers is in pursuit of a Strategic Vision as "the World's premier public engineering organization" to respond to our Nation's needs in time of peace and war. Federally Recognized Tribes as defined by law and policy are considered Sovereign Nations and the U.S. Army Corps of Engineers has a fiduciary responsibility to protect their Tribal way of life and Tribal Trust Resources. Our goal is to build "Synergy" with Tribal Governments, Communities, and people. We are building relationships by seeking first to understand, not merely to be understood. Together with Tribes, we can build solutions that are more positive than either of us could develop on our own. The Corps Strategic Goals are applicable to our service to Federally Recognized Tribes:

**PEOPLE** – Build Positive Relationships with Tribes.

**PROCESS** – Work Effectively with Tribes.

**COMMUNICATION** – It's a 2-way communication. Listen and understand. Communicate internally to understand Tribal perspective.

The U.S. Army Corps of Engineers is Committed to the Following:

**Know Your Job** – Division personnel must know and execute our fiduciary responsibility to Tribes in all our Corps programs.

**Be Situationally Aware** – Respect Tribal Perspective, Concerns and Issues.

**Be Healthy** – Maintain a positive attitude for healthy communications.

**Treat Every Individual with Dignity and Respect** – Treat Tribes, Tribal members and Tribal Cultures with respect.

Finally, Ask Yourself the following Questions:

**Is it Good for Tribes?**

**Is it Legal and Ethical? Is it Something I am willing to be Accountable for?**

If the answers to these questions are YES, then you don't have to seek permission:  
**JUST DO IT!**

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## **CHAPTER I: INTRODUCTION**

### **Purpose of this Guide.**

This guide provides an overview of the special relationship we – as a Federal agency – enjoy with Federally recognized Indian Tribes. This document is intended to provide guidance for those who interact directly with Tribes. As sovereigns, tribal governments have an inherent interest in all proposed and ongoing activities that may have the potential to significantly benefit or impact tribal trust lands, resources or other interests. This special relationship is defined by Federal trust responsibilities, treaty obligations, and the inherent sovereignty of tribal governments.

The Northwestern Division includes all or part of 14 states and includes nearly one million square miles of the North Pacific Region and the Missouri River Basin. At the time of publication of this Desk Guide, there are over 576 Federally-recognized Tribes within the United States. These Tribes have been recognized by the Federal government by treaty, statute, and executive order. There are over 101 Federally-recognized tribes within the geographic boundaries of the Northwestern Division. Each Tribe has a distinct cultural heritage with its own history, values, and identity. Several of these Tribes represent some of the largest land-holding tribes within the Nation; while others have federal recognition status, but small or no land holdings.

### **Northwestern Division Overview: Missouri River Basin and North Pacific Region**

#### **Tribes of the Missouri River Basin**

There are 28 Tribes located within the Missouri River basin. The geographic boundaries of the Missouri River Basin include the homes and lands of several bands of Lakota, Dakota, and Nakota, more commonly referred to as the Sioux, the Blackfeet, the Gros Ventres, the Chippewa-Cree, the Arikara, the Mandan, the Hidatsa, the Northern Cheyenne, the Crow, the Northern Arapahoe, the Eastern Shoshone, the Ponca, the Assiniboine, the Chippewa, the Omaha, the Winnebago, the Prairie Band of Potawatomie, the Kickapoo Tribe of Kansas, the Sac and Fox, and Iowa Tribe. In addition, several other tribes occupied aboriginal homelands in the basin but have since been relocated to other regions of the country. Most of the homelands of the Tribes in the basin are defined by exterior boundaries of a Reservation. Other large population concentrations are identified as Indian Service Areas, contain many acres of scattered and isolated tribal trust lands, but are not defined by an exterior boundary. They enjoy the same recognition status as a Tribe

with a defined reservation boundary. In addition, there are many isolated parcels of tribal trust lands throughout the basin that are remnants of former or diminished reservations.

### **Tribes of the North Pacific Region**

There are 62 Tribes located within the North Pacific Region. The geographic boundaries of Region include the Colville, Nez Perce, Salish-Kootenei of the Flathead Reservation, the Shoshone-Bannock of Fort Hall, Burns Paiute, Warm Springs, the Umatilla, the Yakama, Klamath Tribes, the Coos, Lower Umpqua and Siuslaw, and the twenty-two Puget Sound and Coastal Tribes. Their sovereign status includes Executive Order, Treaty, and Indian Reorganization Act, and recent recognition, such as the Cowlitz Tribe. Some tribal groups, such as the Northern Paiute peoples are outside the Region's boundaries, but have status within the Basin due to the extensive range of aboriginal territory. Therefore, Tribes which include the Fort McDermitt Paiute Shoshone Tribe, as well as the Northern Paiute of the Fort Bidwell Reservation and the Klamath Tribes of Northern California. Other Tribal groups like the Colville and Kootenei, have territories and extended relations across the U.S. Border in Canada.



## **CHAPTER II: WHY IS OUR RELATIONSHIP WITH TRIBES UNIQUE?**

### **Federal Trust Responsibility**

The Federal Indian Trust Responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (*Seminole Nation v. United States*, 1942). It was first discussed by U.S. Supreme Court Chief Justice John Marshall in *Cherokee Nation v. Georgia*, (1831). Over the years, the trust doctrine has been the center of numerous other Supreme Court cases. It is one of the most important principles in Federal Indian law.

The Federal Indian trust responsibility is a legally enforceable fiduciary obligation, on the part of the United States, to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian and Alaska Native tribes. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of dealings with the United States and the tribes.

**Fiduciary Obligation:** The Federal Government, using the highest standards, must protect and safeguard tribal cultural ways of life.

**For more information contact:**

The Department of Interior  
Office of American Indian Trust  
1849 "C" Street, N.W.  
Washington, D.C. 20240  
Phone: (202) 208-3338  
Fax: (202) 208-7503  
Internet <http://www.doi.gov/oaif>

### **Sovereignty**

The Corps recognizes that tribal governments are sovereign entities—they retain inherent powers of government. This sovereignty is recognized in the U.S. Constitution along with that of the Federal government, state governments, and foreign governments. As sovereigns, Tribes have the power to establish a form of government, determine membership, legislate tribal laws and ordinances, and administer justice, among other powers. They also have the power of sovereign

immunity. Tribal sovereignty is a critical foundation for tribal rights to cultural and political survival.

### **Government-to-Government Relations**

The relationship between the Corps of Engineers and Tribes is based on a government-to-government relationship. Tribes are separate governments, have their own form of governance, their own constitutions, their own elected leaders, their own governing councils, and courts. Tribes are not simply another public interest group. Furthermore Tribes, by treaty, law and executive order, have a higher legal status than states, counties, and municipalities. In the conduct of the Corps interaction with Tribes, we must be mindful of our responsibilities as a federal agency to consult with tribal governments in an honest, meaningful and respectful manner, in accordance with tribal process and protocol.

### **Policies, Principles and Regulations**

Department of Defense (DOD) American Indian and Alaska Native Policy, 20 October 1998.

The principles set forth in the DOD policy and were established to guide interactions and working relationships. The principles included in the DOD policy are based on treaties, Federal statutes, executive orders, Federal policy, and input from tribes. The policy acknowledges and by addressing:

- Trust responsibilities;
- Government-to-Government Relations;
- Consultation; and
- Natural and Cultural Resource Protection.

CECW PGL No. 57, Indian Sovereignty and Government-to-Government Relations with Indian Tribes, 18 February 1998

The Chief of Engineers signed the Policy Guidance Letter in order to ensure that all Corps Commands adhere to principles of respect for Indian Tribal governments and honor our Nation's trust responsibility. As interim guidance, the Chief provided specifics by which our relationship with Tribes would be measured and focused. This guidance was issued in the form of U.S. Army Corps of Engineers Tribal Policy Principles. These principles were developed with the Office of the Assistant Secretary of the Army (Civil Works) and are consistent with goals and objectives the Presidential Memorandum of 29 April 1994, entitled Government-to-Government Relations with Native American Tribal Governments. The Corps Policy Principles are:

- Tribal Sovereignty;

- **Trust Responsibility;**
- **Government-to-Government Relations;**
- **Pre-Decisional and Honest Consultation;**
- **Self Reliance, Capacity Building, and Growth; and**
- **Natural and Cultural Resources.**

**Northwestern Division Native American Policy Regulation, NWDR 5-1-1, 15 August 2001**

**The NWD Native American Policy establishes guidance for implementation of USACE Tribal Policy Principles and is applicable to all NWD Commands having military, civil works, and hazardous, toxic, and radioactive waste mission responsibilities. The policy is critical to the development of partnerships and enhancement of the Corps' working relationship with federally recognized Tribal governments. The NWD regulation establishes specific responsibilities for Division and District Commands, including the designation of Native American Coordinators.**

## CHAPTER III: WORKING IN INDIAN COUNTRY

Understand and be aware of the unique status of the Federally-recognized tribe.

Understand clearly what constitutes 'consultation'. (See Chapter IV)

Understand the relationship. Understanding the government-to-government relationship unique to Indian tribes is the first step in preparing for work in Indian Country. It is important to understand:

- Native American Indian Tribes are not "just another" racial minority, such as African Americans, Hispanic Americans, Asian Americans, and others.
- Tribes are not simply "stakeholders", like an interest group or interested party.
- Tribes, by treaty, law and executive order, have a higher legal status than states, counties, and municipalities.

Understand the organizational structure of the tribe. The appropriate contact within the tribe and your district is someone at approximately the same organizational level. Most tribes have technical staff, legal counsel, advisors and managers employed to administer tribal programs. These staff people can be invaluable professional contacts for communication, coordination, and public-involvement efforts commonly carried out between tribal government staff members and equivalent Corps employees. Policy decisions are made by the elected leaders of the tribe. Staff-to-staff work may precede or constitute government-to-government consultation.

Protocol. In diplomatic use, this term is defined by Websters New Universal Unabridged Dictionary as "the ceremonial forms and courtesies that are established as proper and correct in official intercourse between heads of states and their ministers". (Simon and Schuster, 2nd. Edition, 1988: 1448).

• Tribes as Sovereign Nations recognize you as a representative of the U.S. Government.

- Always be conscious of your conduct. Tribal cultures put great emphasis on judging character by one's actions, conduct and response.
- Meetings with tribal officials may start with words of spirituality, prayer or invocation. These prayers are intended to create a positive atmosphere that will lead to mutual understanding and a good outcome for all parties involved. U.S. government rules about separation of church and state do not apply to tribes; they, as sovereign nations, are free to follow their own cultural norms. Show respect for these tribal customs.

- Don't be judgmental about how tribal meetings are run. Tribes may conduct meetings using a blend of traditional and contemporary procedures. Don't be in a hurry and view agendas flexibly.
- Keep your voice to a moderate level. Speaking loudly may be misread as arrogance or "talking down" to those present.
- Be respectful of elders, whether they are in an official position or not. Tribes consider elders to be the repository for their cultural continuity and often the source of considerable intuitive wisdom.
- Do not use your hands while talking this may be considered disrespectful.
- Do not fold your arms during the meeting, this may be considered offensive (putting up a wall).
- Do not make eye contact unless the person makes eye contact with you first. Some tribes believe that you are trying to take power from their spirit.
- Don't interrupt someone who is speaking; provide your undivided attention. Your body language can be especially disruptive to the communication process, and actions such as shaking your head or raising your hand while a tribal elder or leader is speaking can be considered disrespectful.
- Corps terms, vocabulary, acronyms and standard operating procedures may not be familiar to a tribe. Use clear and recognizable references. Avoid agency "jargon."
- If uncertain about anything, talk to the Native American Coordinator.

## **CHAPTER IV: WHAT IS CONSULTATION?**

**“Consultation” is an ongoing relationship and process for initiating and carrying out dialogue between the Corps and Indian tribes regarding proposed and on-going Federal actions in a manner intended to secure meaningful and timely exchanges of information instigated by tribes and or the agency. Consultation includes:**

- **Timely notification of the formulated or proposed Federal action;**
- **Exchange of information of the potential impact(s) on Indian tribes;**
- **Identification of those Federal officials who may make the final decisions with respect to the Federal action;**
- **Input and recommendations of Indian tribes on such proposed action be fully considered by those agency officials responsible for the final decision; and**
- **Notification of the Corps actions resulting from tribal input and recommendations in the decision making process.**
- **Tribes distinguish between formal and informal consultation: Formal being government to government (Division or District Commander meeting with Tribal Council); Informal being all other communications between technical and policy level staff.**
- **Each District should develop communication/consultation protocols for working with tribes within their respective commands.**

**Consultation is a process not an event. Consultation provides a mechanism for seeking and incorporating tribal perspectives into the decision process. Consultation must be pre-decisional and should not be treated as an opportunity to “tell the tribe of the decision”.**

Consultation definitions and understandings will come directly from the tribe you are working with. The following is an outline of guidelines for consultation.

### **Consultation Objectives and Issues**

- **Brief discussion of objectives to be accomplished through consultation**
- **Identification of specific project/program issues requiring consultation**
- **Modification of issues during consultation with Tribes and others**

## **CHAPTER V: MANAGING CONSULTATION**

### **Preparation**

- Identify and distribute flow chart for key project milestones, meeting dates, comment periods, draft plan reviews, final plans, and decision dates
- Identify and budget for direct and indirect costs associated with consultation process
- Identify potential sources of support funding

### **Project Description**

- Describe the federal action or proposed project
- Provide sufficient project detail for the Tribe(s) to determine an interest
- Identify project sponsors, proponents, lead agencies, and decision-makers
- Prepare a map of study or project area, including land ownership status
- Prepare an information packet

The project manager or designated team member should put together a brief information packet consisting of a description of the proposal, an initial list of issues and impacts, maps, drawings, and any other material or references that can help the interested tribes to understand what is being proposed and allows the tribe to establish their level of interest; time frame and allow other tribal representatives to participate in feasible and appropriate manner.

### **Identification of other possible participants as means to enhance communications**

- Treaty councils (case-by-case: District Liaison will advise)
- Tribally-affiliated organizations
- Grassroots organizations
- Other parties as appropriate
- Tribes in process of recognition ( case-by-case: District Liaison will advise)
- State recognized tribes

### **When to Consult**

Consultation should be initiated as early in the Corps decision- making process as possible and should begin when the Corps knows enough about a proposed action to present a coherent proposal and a suggested initial list of issues. If you are uncertain whether any of the information is sufficient for consultation, contact the Native American Coordinator.

### **Initiating Contacts**

- Letter to Tribal leadership initiating consultation process (to be signed by agency leadership (i.e. Division Commander or District Commander)
- Copies furnished to NAC and other Tribal offices or parties as appropriate
- Follow-up phone calls by Project Manager or other team member to Tribe confirming receipt of letters
- Identification of a point(s) of contact at each Tribe(s) and within the Corps

**Legally required consultation:** In several court cases, attempts at written correspondence have been considered insufficient demonstration of an agency's efforts to consult, unless accompanied by telephone and/or direct contact. To avoid false starts and delay, Corps managers and staffs should select a notifications strategy that has a high expectation of success.

### **Arranging Meetings**

- Determine level of meeting—technical, policy, g2g
- Arrange face-to-face meeting(s) between Corps and Tribe(s), and others early, as appropriate
- Coordinate appropriate and convenient date and location for meeting
- Include appropriate representation from Corps, Tribe(s), and others (Commander, NAC, PM, technical staff – Tribal leadership, staff, etc.)
- Collaborate on purpose of the meeting (information sharing, project status, or decision meeting)
- Prepare and share advance agenda stating purpose, issues, participants
- Mutually agree upon follow up or action items
- Arrange future meeting dates and locations as appropriate

#### **Without early consultation**

The Corps may develop proposals based on an incomplete and anecdotal understanding of the issues that surround a particular matter. As a result, Corps proposals often create severe unintended consequences for tribal governments. Issues in Indian country are often more complex than they seem at first, in part because of the great diversity among tribes and the circumstances they face, as well as the long history surrounding the development of federal Indian policy.

#### **With early consultation**

Tribal governments on the scope and impact of a Corps proposal may provide the basis for the Corps to determine what action is appropriate. Pre-decisional consultation helps ensure that issues and opportunities are identified at the beginning and properly addressed; and that the lack of consultation may result in delays and increased costs.



### **When Should Consultation Occur?**

- Before the Corps begins drafting proposed regulations;
- Before the Corps publishes proposed regulations in the Federal Register;
- Before proposed legislation is introduced at the request of the Corps; and
- Before the Corps formulates or implements policies or other actions having implications for tribes.

### **Who Should Consult?**

#### **Corps Participants.**

- The District Commander or his designee\* is only person who conducts government-to-government consultation. All other contacts by Corps employees will be considered technical consultation.
- Project Manager will identify the team members
- Provide the list of team members and contact information to the tribe(s)
- Native American Coordinators are available to assist and advise teams

\*Designee will be confirmed in writing and his/her conformation will be sent to the Tribe(s) prior to government-to-government consultation.

#### **Tribal Participants.**

- Identify all the Federally-recognized tribes that might have an interest in the proposed project or undertaking
- For proposed federal action identified as regional or national in scope, identify the regional or national tribal organizations that may have expertise, and can facilitate dialogue with affected tribes, with respect to the proposed federal action; and
- after notifying all those potentially affected tribes identified under subsections a), b), and c) of this subsection, defer to the expressed views of the tribes regarding who the tribal participants shall be with respect to any consultation

#### **Interagency Cooperation.**

- The Corps will seek and promote cooperation and participation with other agencies that have jurisdiction over, special expertise with respect to, or related responsibilities regarding the Corps proposed legislation, action or policy.

### **Courtesy Notices**

- Notice of public meeting and announcements of opportunities to review project, environmental documents should be provided to all Native Americans who have been identified as having, or may reasonable be expected to have, an interest in Corps activities and authorizations.

### **Documenting the Consultation**

- Document all telephone calls, contacts, coordination activities, etc.
- Develop a thorough copies-furnished list to ensure complete coordination with all appropriate parties
- Prepare and distribute meeting summaries in a timely fashion to all appropriate parties
- Include all documentation in the official project files

### **Concluding Consultation**

- Based on scope of issue, coordinate with Tribes the appropriate point of closure for the consultation
- Prepare and distribute letter of consultation outcome between the Corps and Tribal leadership
- Upon issuance of a Record of Decision (ROD) copies shall be sent via certified mail to all appropriate tribes.
- Negotiate agreement (i.e. MOA, CA, PA, etc.), as appropriate
- Jointly identify need for continued consultation

#### **Length of the Consultation Process.**

The Corps should, at the outset of the consultation process, solicit the views of affected tribes regarding how long the consultation process shall take. The Corps should make all reasonable efforts to comply with the expressed views of the affected tribes regarding the length of the consultation process, taking into account the level of impact, the scope and the complexity of the issues involved in the proposed federal action. Notwithstanding the overall time for the process, consultation should continue throughout the Corps' decision-making process, except where expressly prohibited by law. If the Corps determines that the Administrative Procedure Act or other federal law expressly prohibits continued consultation at a specified point in the decision making process, the Corps should so inform the tribes at the outset of the consultation process.

### **Implementation of Final Federal Action**

Prior to finalizing a decision on a Federal action, the Corps shall address issues raised as priority matters during the consultation process in a meaningful and timely manner appropriate to the issue. Commitments or decisions affecting tribes will be documented in the Record of Decision. The Corps shall continue to consult

with tribes regarding the manner in which that decision is implemented, its benefits or impact on tribes, and any need for training or technical assistance on a new regulation or policy.

## **PROTECTING SENSITIVE INFORMATION**

Native Americans may be reluctant to share sensitive information regarding resource locations and values with agency officials. This is partly because agencies have been hindered, until recently, from effectively protecting Native American cultural information from public disclosure under the Freedom of Information Act.

The 1992 Amendments to the National Historic Preservation Act provide, in Sec 101(d)(6) and 304(a), that:

Properties of traditional religious and cultural importance to an Indian tribe... may be determined to be eligible for inclusion on the National Register;

In carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe... that attaches religious and cultural significance to properties described [above];

[Agency officials] after consultation with the Secretary, shall withhold from disclosure to the public, information about the location, character, or ownership of a historic property if [they] determine that disclosure may (1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners.

Broad information, regarding the general nature of traditional values and the general location of culturally significant traditional places, should be asked for in early planning stages. Going into consultation with knowledge about a group's historic relationship with the land and resources should enable managers to direct their questions in a sensitive and effective way.

Native American groups frequently withhold specific information, unless there is a direct threat to traditional values and culturally significant places.

Before making project-specific decision managers may need to provide additional opportunities for Native Americans to identify their specific concerns.

One of the greatest barriers to completely open consultation discussions is Native Americans' hesitation to divulge information about places that are considered to have a sacred character, or practices that are of a sacred or private nature. In some instances, reluctance to speak of such matters is strong enough to prevent information sharing altogether.

- We must exhibit a high degree of respect and sensitivity when elders or traditionalists convey privileged information about religious locations and practices.
- The extent to which we can limit the public's access to sensitive information must be addressed honestly and openly. We must not overstate our ability to protect sensitive information.

**Limitations.** When they are willing to share it at all, tribal officials and traditional practitioners frequently request that the Corps hold confidential specific information on the nature of traditional locations, traditional uses, and other matters integral to traditional practice. Examples are traditional plant gathering areas, vision quest stations, graves and cemeteries, re-internment locales, ceremonial sites, shrines, and sacred places.

The Freedom of Information Act (FOIA) allows the public to seek disclosure of Federal agency information. It also allows agencies to hold back some classes of material, but the Act generally limits agency discretion in favor of open public access.

"Working files," i.e., documents that are not formal products of the agency or official correspondence are not generally subject to release under FOIA requests (5 U.S.C. 552(b)(3)). Thus, raw ethnographic data and notes are excluded from release under FOIA requests.

This useful classification should not be overused or abused.

New amendments to the National Historic Preservation Act (Sec. 304(a)) have improved the Corps ability to protect more kinds of sensitive Native American information. However, some kinds of potentially sensitive information are still not explicitly exempt from public disclosure.

The 1992 Amendments to the National Historic Preservation Act allow Federal agency officials, with the concurrence of the Secretary of the Interior, to withhold information about the location, character, or ownership of a historic property (i.e., one included in or eligible for the National Register of Historic Places).

Under the NHPA, information can be withheld if disclosure might cause a significant invasion of privacy; risk harm to the historic resource; or impede the use of a traditional religious site by practitioners. These provisions broaden the Corps discretion to protect sensitive information, so long as it relates to distinct, fixed properties.

The Archaeological Resources Protection Act (Sec. 9 and 43 CFR Part 7) allows Federal agencies to protect archaeological resources from harm by restricting information on their nature and location.

Less tangible values, when they coincide in space with historic properties or archaeological resources, could also be protected from disclosure under these authorities. The confidentiality of information less firmly associated with a historic property or archaeological resource, however, is not resolved.

To summarize, the Corps can protect from FOIA disclosure sensitive Native American information that exists only in "working files"; or pertains to a property listed in or eligible for the National Register of Historic Places, if disclosure would risk harm to the property, cause a significant invasion of privacy, or impede the use of a traditional religious site by practitioners; or pertains to an archaeological resource as defined in 43 CFR Part 7, if disclosure would risk harm to the resource.

Managers and staffs carrying out Native American consultation should clearly represent the sort of information they seek, the purposes to which the information will, and will not, be applied, and the limits of the Corps ability to protect the information from public disclosure. The extent of that ability must not be misrepresented.

All sensitive data should be carefully maintained and securely stored. Offices responsible for gathering sensitive information and conducting consultation should have adequate physical and procedural means to ensure secure file maintenance and management.

## APPENDICES:

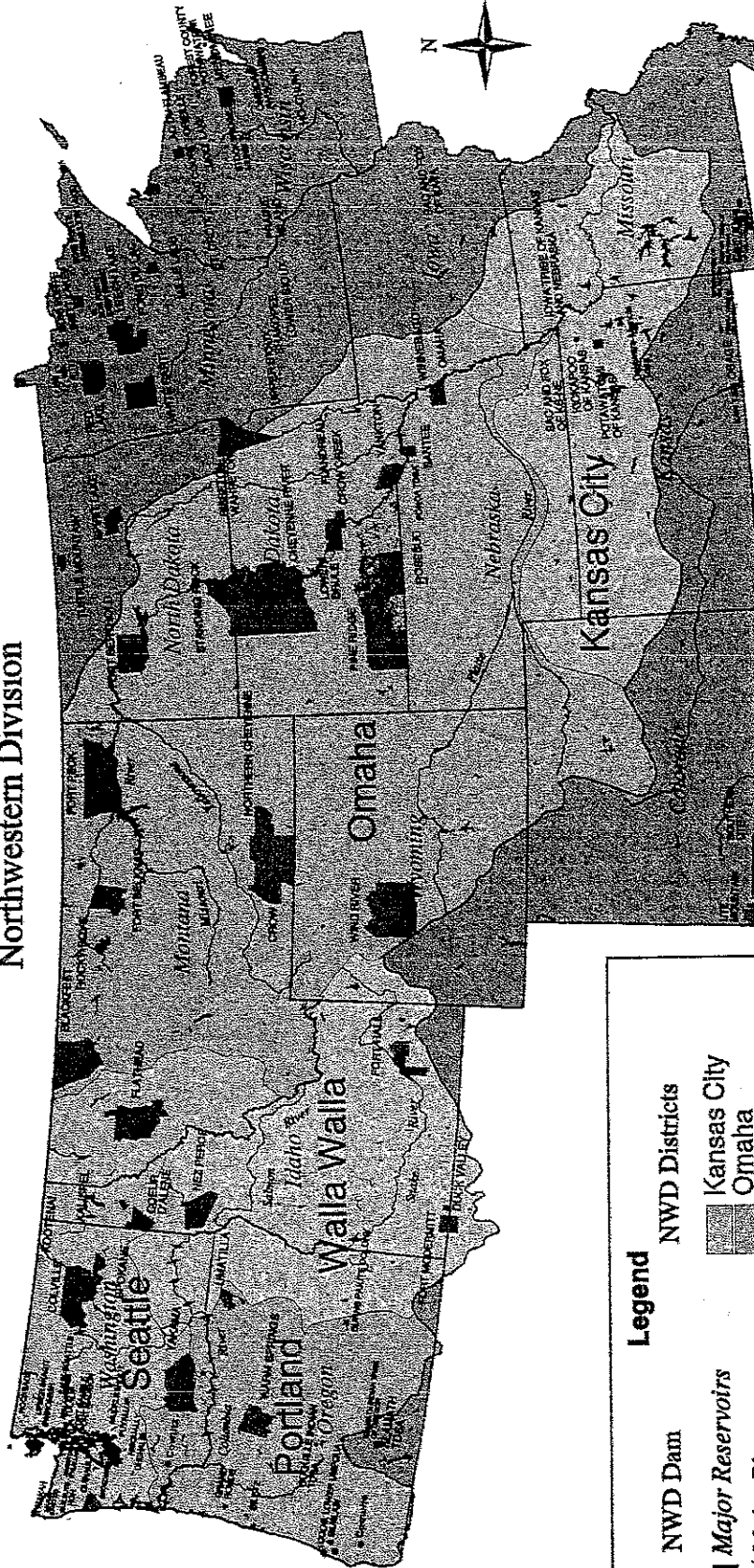
### A. MAP ROOM

web links:    Maps of the NWD, including reservations.  
                 Maps of each District, including reservations  
                 [Http://www.wes.army.mil/el/ccspt/natamap/usa\\_bg](http://www.wes.army.mil/el/ccspt/natamap/usa_bg)  
                 Other maps or sources, as appropriate

# American Indian Reservations

US Army Corps of Engineers

Northwestern Division



## Legend

- NWD Dam
- Major Reservoirs
- Major Rivers
- Indian Reservations
- NWD Civil Boundary
- NWD Military Boundaries
- NWD Districts
  - Kansas City
  - Omaha
  - Portland
  - Seattle
  - Walla Walla
  - NWD Military

March, 2002



US Army Corps  
of Engineers  
Northwestern Division

## B. TREATY ROOM

<http://digitallibrary.okstate.edu.kappler/>

Note: BIA links out of service

<http://www.nara.gov/publications/microfilm/amerinds/indians>



## C. INDIAN LAW ROOM

Indian Law is one of the most complex areas of the law. It is also of vital importance to those Engineer Districts with both intensive and extensive Native American involvement in their projects. Portland District has such involvement, particularly because 4 of the 1855 treaty tribes have their off-reservation treaty rights on the reservoirs behind Bonneville, The Dalles, and John Day Dams. These treaty rights make the 4 tribes the District's partners in the operation and maintenance of these projects.

This document contains a brief summary of some of the key areas of Indian law, followed by appendices. The first appendix is a description of how Oregon and the CTUIR have integrated their judicial systems in the Pendleton, Oregon area. The next 2 appendices are selected excerpts from US Forest Service publications used here in USFS Region 6, collocated with Portland District in the Duncan Plaza Bldg., Portland, Oregon. The last appendix is a copy of a draft legal opinion concerning Portland District and tribal dealings and rights in connection with Bonneville, The Dalles, and John Day Dams. As is obvious from the opinion, the interaction of the District and the tribes has not always been smooth or proper, and ongoing remedial programs must deal with a very extensive legal history set forth in the opinion.

This document draws heavily on other sources, including Forest Service publications and Oregon State Bar Indian Law Section publications.

This document is intended to be only an initial briefing on this complex subject, touching on only some of the most basic legal issues.

## I. INTRODUCTION

### The Constitution

The 1787 (ratified by original 13 States by May 1790) US Constitution, Article I, Section 8, provides in the second proviso that

Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"

The US Supreme Court has consistently held that this clause gives the Congress the exclusive right to legislate and otherwise direct Indian affairs within the United States.

Chief Justice Marshall authored 3 important early opinions: *Johnson v. M'Intosh*, 21 US (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 US (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 US (6 Pet.) 515 (1832). *Johnson* stated the "Discovery doctrine" that gave Congress the exclusive right to extinguish original tribal possession rights without compensation. *Oneida Indian Nation v. County of Oneida (Oneida I)*,

414US 661, 39 L Ed 2d 73, 94 S Ct 772 (1974), and *County of Oneida v. Oneida Indian Nation (Oneida II)*, 470 US 226, 84 L Ed 2d 169, 105 S Ct 1245 (1985) restated this Discovery doctrine. The Supreme Court also held that any abrogation of treaty rights has to be by explicit statutory language, *Oneida II* at 470 US 246; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 US 658, 690, 61 L Ed 2d 823, 99 S Ct 3055 (1979).

*Cherokee Nation* first stated the principle that tribes are legal dependents of their Federal guardian. *Worcester* stated that the principle that tribes are sovereigns, to whom state law does not apply without their consent.

### **History of National Congressional Indian policy**

The history of Congressional Indian policy is the story of consistent inconsistency, as Congress changed policy again and again.

Since the several hundred Indian tribes were dealt with as the Nation expanded, the inconsistency of federal Indian policy means that the tribes' legal history is individual and distinct to each separate tribe. Indian law is a combination of some general history and general laws with the particular treaties and laws for each separate tribe.

#### **Pre-1790 Indian policy**

The Indian tribes in the original 13 Colonies/States were dealt with prior to the current Constitution. The treatment of the tribes varied from colony to colony, with the most common result being that most of the tribes were exterminated one way or the other. Today, the surviving tribes are found in the Northeast (New York, Connecticut, Rhode Island, Massachusetts, and Maine) and in a few small areas in Virginia and North Carolina.

#### **The 1790's**

In the 1790's, Congress passed a series of Trade and Intercourse Acts to exercise federal control over the tribes:

Non-Intercourse Act of July 22, 1790 (1 Stat. 131; 18 USC 1511 ff.) [exercised federal jurisdiction over tribes and forbade States to do likewise];

Trade and Intercourse Act of March 1, 1793 (1 Stat. 3.29) [provided for sale of Indian lands];

Trade and Intercourse Act of May 19, 1796 (1 Stat. 469) [established Indian country; provided for boundary changes by treaty];

Trade and Intercourse Act of March 3, 1799 [similar to 1796 act].

In 1802 Congress amended the law again with the Trade and Intercourse Act of March 30, 1802 (2 Stat. 139).

In the Act of May 18, 1796 (1 Stat. 464), Congress established the public land survey system in the United States, using rectangular units for the sale of public lands. The "old Northwest" – Ohio and the area north of the Kentucky River – was directed to be surveyed for public land sales.

#### 1802 – 1871 Military conquest

For the Indian tribes in the "old Northwest" that sided with the British in the War of 1812, American victory brought loss of lands. This was the continuation of the taking of Indian lands by military victory and compelled treaties as White settlement of the continent continued.

The Indian Removal Act of May 28, 1830 (4 Stat. 411; 25 USC 174) enabled presidents to remove tribes east of the Mississippi River to lands west of the Mississippi River. Under this statute, most of the tribes east of the Mississippi were driven west or exterminated.

The Trade and Intercourse Act of June 30, 1834 (4 Stat. 729) redefined Indian country to its then current scope and limited the taking of Indian lands to treaty or convention ratified by Congress.

In 1848, the United States ended the Mexican War with a treaty that recognized Spanish and Mexican land-grants, but in practice led to the States of Texas and California seizing whatever Mexican and Indian lands they wanted, often through fraud and extortion. California denied Indians citizenship rights and title to property received in Mexican land grants, contrary to the provisions of the Treaty of Guadalupe Hidalgo (1848). The California Indians, with the exception of some northern tribes along the Klamath River, never received back any significant portion of the land stolen from them.

In the same period, the tribes of Western Oregon pretty much had their lands taken from them, as did many other tribes in the western expansion of the country.

In 1855, the newly-appointed Washington Territorial Governor, as one of his first acts, traveled the Washington Territory with the Oregon Territory's Indian manager, entering into a series of similar 1855 treaties with the tribes of the Columbia River Basin and Puget Sound. These treaties generally reserved off-reservation treaty hunting and fishing rights. The ensuing Indian wars ended around 1870.

The Indian Appropriations Act of March 3, 1871 (16 Stat. 566; 25 USC 71) ended the president's power to enter into treaties with tribes. Thereafter tribal reservations were created by agreements, statutes, and executive orders.

389 treaties were negotiated, signed, and ratified prior to the 1871 cutoff. 60 of these treaties conferred reserved rights on federal lands. The courts have generally interpreted treaty rights broadly and elimination of these rights narrowly. See *Fishing Vessel Assn.*, above, for an example of how reserved off-reservation treaty fishing rights have been

converted to a 50% share of the fish harvest by the federal courts. As noted above, Congress retains the right to abrogate Indian treaty rights, *Lone Wolf v. Hitchcock*, 187 US 553 (1903).

#### 1871 – 1912 Transition Period: Original Allotment Statutes; End of Westward Expansion

The Major Crimes Act of March 3, 1885 (23 Stat. 362; 18 USC 1153) first applied federal criminal jurisdiction to major felonies in Indian country.

The Dawes Act of Feb. 8, 1887 (24 Stat. 388; 25 USC 331) first authorized the assignment of Indian lands by allotment to individual Indians. This failed assimilation statute transferred over 80 million acres of Indian lands into private ownership, where many of the lands were quickly sold to non-Indians. This statute first made US citizenship available to Indians taking allotments.

The Act of March 3, 1891 (26 Stat. 1035; 16 USC 471) established a court of private land claims to deal with Spanish and Mexican land grant claims in Colorado, Nevada, and Wyoming; and all claims in Arizona, New Mexico, and Utah.

The Allotment Act of June 25, 1910 (PL 313; 36 Stat. 855; 25 USC 331 ff.) amended the Dawes Act and provided allotments for Indians living on or improving National Forest land.

1912 saw the admission of the last 2 states in the Continental United States. Their admission ended a century of expansion west.

#### 1912- 1949 Closing Out the Past

The Indian Citizenship Act of June 2, 1934 (PL 175, 43 Stat. 253; 8 USC 1401(b)) granted US and state citizenship to all Native Americans for the first time.

The Act of June 7, 1924 (PL 254, 43 Stat. 636 ff., 28 USC 111) established the Pueblo Lands Board so that non-Indians could validate their title to previously acquired Pueblo lands.

The Indian Reorganization Act of 1934 (PL 383, 48 Stat. 984, 25 USC 461-462) (1) ended allotments in severalty (multiple owners); (2) gave the Secretary of Interior the authority to acquire lands for Indians inside and outside of reservations; and (3) allowed tribes to reorganize and adopt bylaws approved by the Secretary of the Interior. 181 tribes accepted reorganization under this act, but another 77 rejected reorganization as another unwanted interference in tribal affairs by the Federal Government.

The Indian Claims Commission Act (ICCA) of Aug. 13, 1946 (PL 725, 60 Stat. 1049 ff; 25 USC 70-70v) established the Indian Claims Commission to give the tribes justice for all past offenses, prior to Aug. 13, 1946. The ICCA authorized relief for claims in law or equity, arising under the Constitution, laws, treaties of the United States, and all other claims in law or equity, and claims based upon dishonorable dealings not recognized by any existing rule of law or equity. Over the next 3 decades, the Commission heard and tried all of the tribes' claims for past wrong-doings to the tribes and awarded money damages to the tribes that were deposited in Judgment funds for each tribe. This was not a full remedy as tribes did not get lost lands and resources back. Moreover the damage awards were offset by a number of factors. But it did bring to a judicial close claims for past injuries and damages. The Commission was abolished in 1978, and all pending cases transferred to the Court of Federal Claims. Some are still pending 50 years later.

#### 1950 – 1960 The Last Gasp of Assimilation

The last and probably final attempt at assimilation of Native Americans into the dominant non-Indian culture lasted for 8 years during the Eisenhower Administration. Secretary of Interior McKay, former Oregon governor, obtained the passage of the Act of Aug. 15, 1953 (PL 90-280; 67 Stat. 588; 18 USC 1360) which gave California, Minnesota, Nebraska, Oregon, and Wisconsin jurisdiction over tribal reservations for both criminal and civil purposes. In Oregon the Warm Springs Reservation was exempted from this state jurisdiction.

Other states were also subsequently given state authority over tribes for some or all purposes: Alaska (all purposes); Arizona (air and water control only); Florida (full criminal and civil jurisdiction over Indians); Idaho, Iowa, Montana, Nevada, and Utah (criminal and civil jurisdiction, as well as child abuse, neglect, and certain domestic matters); Washington (limited jurisdiction), North Dakota (civil jurisdiction if tribes consent – none have), South Dakota (limited civil jurisdiction), New York and Kansas (limited jurisdiction).

This act also terminated the federal recognition and benefits to a large number of tribes, including:

All Western Oregon tribes, including the Siletz, Grand Ronde Community, Cow Creek Band of Umpqua, Confederated Coos, Lower Umpqua, and Siuslaw Indians (all have subsequently regained recognition, but not lost reservations);

Klamath, Modoc, and Yahoosking Band of Snake Indians of Oregon (Klamath have regained some recognition);

40 California Indian Rancherias (32 have been restored);

Mixed Blood Ute Indians of Uintah and Ouray of Utah;

Paiute Indian Tribe of Utah;

Ponca Tribe of Nebraska;

Alabama and Coushatta Tribes of Texas;

Menominee Tribe of Wisconsin (regained some rights);

Ottawa Tribe, Peoria Tribe, and Wyandotte Tribe – all of Oklahoma;

Catawba Indian Tribe of South Carolina.

### 1961 – 2002 The Self-Determination Era

While policy changed with start of the President Kennedy's term in 1961, it wasn't until the Indian Civil Rights Act of April 11, 1968 (PL 90-284, 82 Stat. 77, 25 USC 1301 ff.) that the statutory rollback started. This act extended the protections of the Bill of Rights to tribes, tribal governments, and tribal members on the reservations for the first time, as well as allowing states to "retrocede" the state jurisdiction over reservations given them in PL 90-280.

The Alaska Native Claims Settlement Act (ANCSA) of Dec. 18, 1971 (PL 92-203, 85 Stat. 688, 43 USC 1601 ff.) extinguished aboriginal title in Alaska, as well as aboriginal hunting and fishing rights, and transferred 44 million acres to Alaska Native owned and controlled state-chartered corporations. The effect of this act was to create a separate body of Indian Law for Alaska.

Menominee Restoration Act of Dec. 22, 1973 (PL 93-197, 87 Stat. 770, 25 USC 899) provided for continuation of tribal hunting and fishing rights, without any Wisconsin state law restrictions, after the Menominee were disestablished as a federally-recognized tribe for other purposes and otherwise subjected to state laws like non-Indians.

Indian Self-Determination and Education Assistance Act of Jan. 4, 1975 (PL 93-638, 88 Stat. 2203, 25 USC 450 ff.) provided for transfer of administration of federal Indian programs to tribal administration and control, effectively moving tribes from dependent status to independent, self-managing status.

American Indian Religious Freedom Act of Aug. 11, 1978 (PL 95-341, 92 Stat. 469, 42 USC 1996) explicitly recognized the importance of traditional Indian religions and practices and directed all Federal agencies to insure that their policies will not abridge the free exercise of Indian religions.

Indian Child Welfare Act of Nov. 8, 1978 (PL 95-608, 92 Stat. 3969-3084, 25 USC 1901-1961) regulates the adoption of Indian children and requires that most adoptions and guardianship cases be held in tribal court. The act also established a preference for Indian guardians over non-Indian guardians for cases tried in state courts.

Native American Graves Protection and Repatriation Act (NAGPRA) of Nov. 16, 1990 (PL 101-601, 104 Stat. 3048, 25 USC 3001-3013) provided for the inventory and repatriation to tribes of bodies, funeral artifacts, and other specified archeological items belonging to the tribes. The act also provides safeguards for future inadvertent discoveries of Indian bodies, funeral artifacts, and specified archeological items belonging to tribes.

## **Status of Corps – Tribal Relationships in 2002**

### **Corps-wide**

President Clinton issued several Executive Orders directing each federal agency to directly deal with the tribes its programs affected. On October 20, 1998, the Department of Defense (DOD) followed this up with an unpublished policy letter. CECW PGL No. 57, Indian Sovereignty and Government –to-Government Relations with Indian Tribes was issued on February 18, 1998 by the Chief of Engineers.

Generally, federally-recognized Indian tribes are qualified sponsors for most civil works programs, including several designated tribal assistance programs.

The Corps Institute for Water Resources has just published IWR 01-PS-3, a report on Tribal Partnership Program, January 2002. The report focuses on Sec. 203 Tribal Partnership Program study authority, recently given the Corps in the Water Resources and Development Act (WRDA) 2000. The report suggests ways that the Corps implement the new study authority to assist tribes.

### **Northwestern Division**

In Northwestern Division, there is a wide variety of tribes and legal relationships. Generally, the tribes of the Great Plains and the Missouri River Basin have a different legal history than those of the Columbia River Basin and the Pacific Northwest.

In the Columbia River Basin and the Pacific Northwest, the most significant divisions among the tribes in terms of impacts and relationships with the Corps are: (1) 1855-treaty tribes; (2) non-1855-treaty tribes never de-recognized or terminated; and (3) non-1855 treaty tribes who were at one time de-recognized or terminated but are now re-recognized.

1855-treaty tribes in Idaho, Oregon, and Washington have significant off-reservation hunting and fishing rights, governed by 7 Supreme Court cases.

Non-1855 treaty tribes that were never de-recognized or terminated still have the same reservations they were given decades ago.

Non-1855 treaty tribes that were formerly de-recognized or terminated generally have lost most of their original reservations. Some have tiny reservations. Others have no reservations. Most of these tribes are in Oregon, and were terminated in 1952-1953.

In addition there non-federally-recognized tribes, whose concerns are usually presented through recognized-tribes.

There are also several tribes whose reservations constitute all or part of civil works projects. Each of these situations has its own history and relationships.

### **Portland District**

#### **Western Oregon and Washington and Oregon-California Border**

Slowly many of the terminated tribes in 1952-1953 are being re-recognized.<sup>1</sup> In addition new tribal groups are gaining federal recognition for the first time. This means change for the near future. None of these tribes have reservation lands adjacent to any current civil works projects. However, their interests are impacted by some of the river basin civil works study projects currently authorized.

#### **South Central and Southeastern Oregon**

There are 2 small reservations, one near Burns, Oregon, and the other on the Oregon-Nevada border for Paiute. Neither is adjacent to any current civil works project. Both groups are small and poor, and appropriate candidates for any available federal and state assistance programs.

#### **Mid-Columbia River Basin Tribes**

The most significant tribal relationships in Portland District in 2001 are the Mid-Columbia River Basin 1855 treaty tribes, who have treaty fishing rights that, by prior federal actions, lie exclusively in the reservoirs behind Bonneville, The Dalles, and John Day Dams. These fishing rights effectively make the Confederated Tribes and Bands of the Yakama Indian Nation (YIN), the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), and the Confederated Tribes of the Warm Springs Reservation (Warm Springs) partners of the Portland District and the Northwestern Division in the operation of the three listed Corps dams.

In addition, these tribes have extensive rights on other waters as well. The Nez Perce is a statutory partner of Walla Walla District in the operation of the Lower Snake River Mitigation Program in Idaho adjacent to their reservation. The YIN have significant

<sup>1</sup> Klamath Tribe, 25 USC 566 ff.; Siletz Tribe, 25 USC 711 ff.; Cow Creek Band of Umpqua, 25 USC 712 ff.; Confederated Tribes of Grand Ronde Community of Oregon, 25 USC 713 ff.; Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, 25 USC 714 ff.; Coquille Tribe, 25 USC 715 ff.; additional relief, Indian Tribes of Oregon, 25 USC 771 ff.; Hoopa-Yurok Settlement, 25 USC 1300i ff.



statutory rights on other water ways that are tributaries to the Columbia River in the State of Washington and within or adjacent to their reservation. The Warm Springs have significant water rights connected to their reservation on the Deschutes River and tributaries in Oregon. The CTUIR have extensive rights and interests in the Columbia River and Umatilla River adjacent to their reservation.

The relationships between these tribes and Portland District civil works projects on the Columbia River is very complex, involving a relationship that extends back to 1871 when Portland District was formed and continuing through a host of civil works projects and programs that are still ongoing. A Legal Appendix, prepared for the Celilo Village Post-Authorization Change Report (2002), provides the details of this complex 131 year history of Portland District projects and Columbia River treaty fishing rights, as well as discussing the Supreme Court cases which established the treaty fishing rights' legal interpretation. The appendix was prepared in support of a request for corrective legislation.

#### NAGPRA and Other Cultural & Archeological Partnering Processes

In addition to the treaty fishing rights, the operation of the District's Columbia River dams continues to cause the occasional erosion of ancient tribal burial sites along the river, triggering the inadvertent discovery provisions of NAGPRA. Also, in connection with the construction of the District's dams, other tribal archeological materials and bodies were discovered.

To comply with NAGPRA and to provide a workable means to resolve and avoid inter-tribal disputes over which of the 3 tribes with ceded lands in the Mid-Columbia River Basin has priority of title to various archeological materials and human remains, Portland District and the affected tribes have agreed to a combination of formal and informal working relationships in which significant portions of past archeological collections are curated in tribal museums. The curation agreements generally provide that title to the collections remains in the United States due to the practical impossibility of identifying in most case which of the tribes has the best claim to the collections. In addition, there is an informal agreement that the tribes and the Corps, as well as other appropriate federal, state, and local agencies, will promptly reinter ancient human remains that are eroded along the banks of the Columbia River. The State of Oregon has a "Little NAGPRA" statute that facilitates cooperation on the Oregon side of the Columbia River.

There is also a joint federal-tribal-state working group to provide for continued cooperation in federal compliance with federal and state archeological laws.

#### Other District-tribal-Oregon relationships

Federal law provides a wide range of opportunities for federal-state-tribal cooperation and mutual assistance. Portland District is continuing to work towards maximizing the opportunities and cooperation, as well as assisting the tribes in getting the most benefit out of federal and state programs for their benefit. The fact that the State of Oregon has

its own progressive Indian programs and actively seeks to assist the tribes in improving their economic welfare provides a trilateral tribes-state-federal partnering environment rich in opportunity for all concerned.

The tribes with rights and lands in Portland District will continue to be significant and important "customers" of the Portland District's various civil works projects.

### **Non-Corps Tribal Relationships**

#### **Oregon State Bar Indian Law Section**

One of the more important regional forums for working out the many legal complexities and inconsistencies among federal, state, and tribal laws and regulations is the Oregon State Bar's (OSB) Indian Law Section. The Section provides continuing legal education (CLE) in tribal law matters as well as in conflicts of laws issues.

#### **Jurisdiction**

##### **FEDERAL COURTS:**

Federal courts are courts of limited jurisdiction. Authority over Indian matters is limited to specifically authorized subjects.

##### **Federal Criminal Law:**

Indian reservations are generally considered federal lands within the special maritime and territorial jurisdiction of the United States as defined in 18 USC 7.

18 USC 13, the Assimilative Crimes statute, generally adopts state law as a substitute to fill the vacuum where federal law fails to provide criminal law coverage on federal lands.

18 USC 1151 defines "Indian country" to include Indian reservations, other dependent Indian communities, and all Indian allotments.

18 USC 1152 generally provides that federal criminal law extends to Indian country. This section excludes from its reach: offenses committed by one Indian against another, both personal and property offenses, nor does it reach any Indian committing any offense in Indian country who has been punished by local tribal law. Also excluded are any other exclusions provided for by treaty.

18 USC 1153 makes most common law felonies punished elsewhere in Title 18 USC applicable to Indian reservations, in effect overriding 18 USC 1152 for most major crimes committed by Indians (or anyone else) on reservations. 18 USC 1153 also duplicates the Assimilative Crimes statute (18 USC 13) by adopting state criminal law where federal criminal law has a void.

18 USC 1154-1156 are special criminal statutes prohibiting the introduction of alcohol in Indian country.

#### Civil Law:

The first issue in civil law is always whether the parties have waived their sovereign immunity to suit in federal court. This requires an examination of statutes, ordinances, and documents pertaining to the matter at issue. Federal agencies, tribes, and state and local governments all have certain sovereign immunity protections.

The second issue is whether appropriate federal, tribal, and/or state law confers jurisdiction on the proposed court for the proposed subject matter. This is always a complex matter.

#### Federal Statutes:

28 USC 1331 provides jurisdiction in federal district courts to resolve civil suits arising under the Constitution, laws, or treaties of the United States.

28 USC 1332 provides for diversity jurisdiction in federal district courts where the amount in controversy exceeds \$75,000.

28 USC 1333 provides exclusive jurisdiction in federal district courts for admiralty and maritime cases.

28 USC 1334 provides exclusive jurisdiction in federal courts for bankruptcy matters.

28 USC 1353 provides jurisdiction in federal district courts to resolve disputes involving Indians over ownership of Indian allotments.

28 USC 1362 provides federal district court jurisdiction for suits brought by the governing bodies of federally-recognized tribes for cases arising under the Constitution, federal law, or treaties.

Other provisions of Title 28 USC also provide for federal court jurisdiction.

#### STATE LAW:

##### Criminal Law:

18 USC 1162 is where PL 90-280 is codified, in which certain states were given back in 1953 state jurisdiction over crimes on Indian reservations, including Alaska (except Metlakatla Indian community on Annette Islands), California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and

Wisconsin. Sections 1152-1153 above are not applicable in these states where state law applies.

#### Civil Law:

28 USC 1360 is where PL 90-280 is codified, in which certain states were given back in 1953 state jurisdiction over all civil matters involving Indians on Indian reservations or in other Indian country, whereby Indians are treated like any other private citizens. These states include Alaska, California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin. Certain restrictions apply. Nothing in this section authorizes the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States. Nor is any regulation on the use of such Indian property authorized in a manner inconsistent with any Federal treaty, agreement, statute, or regulation made pursuant thereto. Nor does this statute confer on states jurisdiction to adjudicate, in probate proceeding or otherwise, the ownership or right to possession of such property or any interest therein. Tribal ordinances shall, if not inconsistent with any state law, be given full-force and effect in the determination of the civil causes of action pursuant to this section.

#### Retrocession of Rights by States:

Congress in 25 USC 1323 has authorized states to retrocede their rights back to the states in a process requiring Secretary of Interior acceptance of state retrocessions. Since this is a tribe-by-tribe, state-by-state process, it has caused more confusion and lack of uniformity in Indian law. The practical impact of this section is that each state now has the legal power to make its own state-tribal agreements, and many states have chosen to do just this, including Oregon and Washington.

#### TRIBAL COURTS

Congress has recognized and supported tribal governments' and tribal courts' governance over their own members, providing a Model Code (25 USC 1311) and an Indian "Bill of Rights" (25 USC 1302) to guide such actions.

#### THE BOUNDARIES AMONG FEDERAL, STATE, AND TRIBAL JURISDICTION

Congress has left it to case law to establish the jurisdictional boundaries among the federal courts, the state courts, and the tribal courts. The law in this area is consequently still developing and very complex. Persons needing information in this area should check the latest case law out of the Supreme Court and the Circuit Courts of Appeal for the areas of concern.

#### COMMERCIAL RELATIONS

Congress still has on the law books numerous laws restricting the ability of tribes and individual Native Americans to dispose or alienate tribal property, allotments, and other federal trust properties. In addition numerous statutes require Secretary of Interior approval of tribal contracts (see 25 USC 81 (7 or more years encumbrance of real property), 25 USC 82 (attorney contracts), 25 USC 85 (contracts involving tribal funds or trust property), 25 USC 261 ff. (anyone trading with Indians needs Interior Dept. approval), 25 USC 381 ff. (Indian irrigation has to be provided only by Interior Dept.)

## **D. COMMUNICATIONS**

### **NWD Points of Contact.**

**Division Commander, BG David Fastabend, 503-808-3700**  
**Deputy Division Commander, Col. Daniel Krueger, 503-808-3701**  
**Native American Program Office: Lynda Walker, 503-808-3715;**  
**lynda.l.walker@usace.army.mil**  
**Cultural Resources: John Tyger: 503-808-3861**  
**Office of Counsel: Rebecca Ransom: 503-808-3762**

## **E. DISTRICT PROFILES and CONTACTS**

### **Kansas City (NWK)**

#### **Kansas City District Points of Contact**

**District Commander, Col. Donald Curtis, 816-983-3201**

**Native American Program Office : Kimberley C. Oldham, 816-983-3100;**

**[kimberly.c.oldham@usace.army.mil](mailto:kimberly.c.oldham@usace.army.mil)**

**NAGPRA Coordinator 816-983-3107**

### **Omaha (NWO)**

#### **Omaha District Points of Contact**

**District Commander: Col. Uhbelohde, 402-221-3900**

**Native American Program Office: Pem Hall 402-221-3988;**

**[pem.j.hall@usace.army.mil](mailto:pem.j.hall@usace.army.mil)**

**District Archaeologist 402-221-3110**

### **Portland (NWP)**

#### **Portland District Points of Contact**

**District Commander: Col. Randall Butler, (503) 808-4500**

**Native American Program Office—(503) 808-4508: [lynda.l.walker@usace.army.mil](mailto:lynda.l.walker@usace.army.mil)**

**Deputy for Program Management—(503) 808-4300**

**Environmental Resources Manager—(504) 808-4700**

**District Archaeologist—(503) 808-4766**

### **Seattle (NWS)**

#### **Seattle District Points of Contact**

**District Commander: Col. Ralph Graves, 206-764-3690**

**Native American Program Office: Tommye Owings 206-764-3625,**

**[tommye.e.owings@usace.army.mil](mailto:tommye.e.owings@usace.army.mil)**

### **Walla Walla (NWW)**

#### **Walla Walla District Points of Contact**

**District Commander: LTC Richard Wagenaar, 509-527-7100**

**Native American Program Office: Bill Mellick 509-527-7107;**

**[bill.s.mellick@usace.army.mil](mailto:bill.s.mellick@usace.army.mil)**

## **F. OTHER PROGRAM CONCERNS**

### **Cultural Resources**

Particular known areas of concern to the tribes are as follows:

- **National Historic Preservation Act (NHPA) Sec 106 Tribal Consultation**
  - **Native American Graves Protection and Repatriation Act (NAGPRA)**
    - Inadvertent Discoveries**
    - Claims**
    - Repatriation**
    - Disposition of Human Remains, Associated Funerary Objects, and Objects of Cultural Patrimony**
  - **Curation of Archaeological Collections (36 CFR 79)**
  - **Archaeological Resources Protection Act (ARPA)**
- Historic Properties Management Plans, which guide all protection and preservation activities**

### **Emergency Management**

Tribes, as Sovereign Nations, can declare emergencies and request assistance from the Corps of Engineers, similar to States and local governments.

### **Resource Management**

Tribes have an inherent interest in all aspects of natural resource management activities involving such issues, but not limited to, ESA, Clean Water Act, navigation, habitat enhancement



OMAHA DISTRICT  
DRAFT  
CONSULTATION OUTLINE

## **Draft CONSULTATION OUTLINE**

Federal agencies and Tribes acknowledge the requirement, the value and the necessity of meaningful consultation. Numerous Federal laws, regulations, Executive Orders, and policies reference consultation in a general fashion, but there are no agreed upon definitions or procedures for the practice of consultation.

This format provides a minimal level of interaction to establish a process and guidelines for meaningful consultation that would be recognized and followed by the Omaha District. Responsibilities for consultation will be met and shared between the District and the appropriate Tribes. Coordination and cooperation will be the foundation.

The guidelines are not intended to replace specifically mandated consultation requirements, such as those identified in the National Historic Preservation Act or the Native American Graves Protection and Repatriation Act implementing regulations. Rather, they would provide a framework for implementing those requirements.

### **GOALS FOR CONSULTATION**

- Initiate consultation at the very beginning of the planning process (*cannot be emphasized enough*).
- A formal, mutually agreed upon process for communication and coordination based on meaningful participation and interaction, with identified procedures and shared responsibilities.
- Government-to-government level of interaction consistent with the spirit and the letter of laws, regulations, Executive Orders and policies, established protocols, and based on mutual respect
- A commitment to acknowledge and follow, at a minimum, certain guidelines, practices, and procedures
- Recognition by all parties that the guidelines satisfy the intent and process for adequate consultation

### **ABSTRACT**

There are four distinct phases to the consultation process. They are: Preparation, Initiating Consultation, Consultation, and Documentation. Each of these has specific activities that need to be completed to ensure that the consultation process will move forward with the assurance that the specific tribal government's rights and concerns are considered.

### **PREPARING FOR CONSULTATION**

- Identify key project milestones, comment periods, draft plan reviews, final plans, and decision dates with project team.
- Identify each tribe and tribal organization that needs to be included in the consultation process, including:
  - Federally-recognized tribes
  - Treaty councils
  - Tribally-affiliated organizations
  - Grassroots organizations
  - Other parties as appropriate
  - Develop a thorough copy-furnished list to ensure complete coordination with all appropriate parties
- Prepare briefing document for Corps officials and Corps team members to include:
  - Tribal infrastructure and organization of tribal government
  - Tribal Council Members
  - Districts on the Reservation
  - Land Base
  - Short history of relationship with the Corps
  - Amount of land lost to Pick/Sloan
  - Key issues that may surface around historic issues.
  - Include positive outcomes of Pick/Sloan
  - Include info on ongoing projects with Tribe and positive outcomes
  - Include information on ceremonial and meeting protocols and what is expected of participants
- Identify scheduled regional tribal meetings and conferences with their dates and meeting places.
- Develop and coordinate preliminary project-specific consultation plan, based on Omaha District Consultation Plan Framework. This plan is later amended if necessary after consultation begins or if people/conditions change.
- Identify and budget for direct and indirect costs associated with consultation process

## INITIATING CONTACT

The initial contact should be by telephone to notify the tribe that a letter and materials will be coming, to provide a first introduction to the project, and to gather any preliminary information regarding an initial POC, potential issues, schedule of Tribal meetings, etc.

- Corps PM or designee calls each Tribal Chairman. If unavailable, speaks to Executive Officer or Administrative Officer.
- Introduces self and states that we will be initiating consultation.
- Briefly describe project.
- Describe letter initiating consultation and materials that will be coming, and when they should receive it.
- Request POC for the Tribe for preliminary exchange of information on the project.
- Request for identification of other Tribal Officials who should receive copy-furnished and materials.

## CONSULTATION

### *Written*

- Letter to Tribal leadership initiating consultation process (to be signed by agency leadership (i.e. Division Commander or District Commander). Letter should include:
  - Describe the federal action or proposed project
  - Provide sufficient project detail for the Tribe(s) to determine an interest
  - Identify project sponsors, proponents, lead agencies, and decision-makers
  - Identify the Project Manager, who will be the primary POC for the Corps on the project, as well as the team members and their responsibilities.
  - Include a map of study or project area, including land ownership status
  - Include chart of key project milestones, comment periods, draft plan reviews, final plans, and decision dates. Suggest appropriate points for meetings.
  - Brief discussion of objectives to be accomplished through consultation
  - Identification of specific project/program issues requiring consultation
  - Request for identification of specific issues the Tribe may have with respect to the project.
  - If written agreements are anticipated, identify at this time, if known.
  - Request Tribal POC to work with PM.
- Include list of all Tribal recipients receiving the letter.
- Copies furnished to NAC and other Tribal offices or parties as appropriate (moved)

### *Follow-up by Phone*

- Follow-up phone calls by Project Manager or other team member to Tribe confirming receipt of letters and to determine if there are questions or any additional information needed (allow at least 14 days).
- Confirmation of or initial identification of a point(s) of contact at each Tribe(s) and within the Corps.
- Discuss and schedule initial meetings.
- Through Tribal POC, arrange face-to-face meeting(s) between Corps and Tribe(s), and others early, as appropriate
- Coordinate appropriate and convenient date and location for meeting
- Include appropriate representation from Corps, Tribe(s), and others (Commander, NAC, PM, technical staff – Tribal leadership, staff, etc.)
- Collaborate on purpose of the meeting (information sharing, project status, or decision meeting)
- Identify meeting leaders from Corps and Tribe.
- Collaborate on notification methods (if needed) and any equipment needed (audio-visual)
- Discuss meeting protocol with Tribal POC so traditional ceremonial activities can be conducted at the proper time. (Add info to briefing material provided to Corps attendees).
- Prepare and share advance agenda stating purpose, issues, and participants
- Send letter confirming date, time, and location of meeting and its purpose, including a copy of the suggested agenda.

- Develop itinerary for Corps officials, and alert Lake Project Managers so they can attend.
- Provide material prepared on each tribe to Corps attendees.

***Hold Meetings***

- Arrange for tape recorder or note-taker.
- Follow meeting protocol identified in briefing materials.
- Follow agenda, but understand that there is a need for flexibility.
- Allow Tribal officials to speak first. Allow them to recount historic events, and allow time for them to “tell their story”.
- Corps officials introduce themselves and give a short description of their involvement with the Corps and the Tribe.
- Discussion:
  - Answer any questions Tribal members may have about the project or process.
  - Identify concerns and issues.
  - Discuss possible resolutions.
  - Find common ground as much as possible. Agree to set aside issues for later discussions if the need arises.
  - Mutually agree upon follow up or action items
- Arrange future meeting dates and locations as appropriate
- Negotiate agreement (i.e., MOA, CA, PA, etc.) as appropriate.

***Concluding Consultation***

- Based on scope of issue, coordinate with Tribes the appropriate point of closure for the consultation
- Prepare and distribute letter of consultation outcome between the Corps and Tribal leadership
- Jointly identify need for continued consultation
- While official consultation on a specific project may end, ongoing relationships with the Tribe(s) are encouraged. The more trust that is built between Corps team members and Tribal members, the smoother future consultations will be.

**DOCUMENTING THE CONSULTATION**

- Document all telephone calls, contacts, coordination activities, meetings, etc.
- Prepare and distribute meeting summaries in a timely fashion to all appropriate parties
- Include all documentation in the official project files